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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 671

V. K. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

vs.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JANUARY 4, 1941.

CERTIORARI GRANTED MARCH 3, 1941.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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[fols. 1-2] [Caption omitted]

[fol. 3] **IN THE SUPREME COURT OF NEBRASKA**

STATE ex Rel. THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator,

vs.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent

PETITION IN MANDAMUS—Filed May 21, 1940

Comes now the Relator and for cause of action against the Respondent alleges:

I

That relator is, and was at all times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Nebraska, with its principal place of business in the City of Omaha, Nebraska; that Relator is now, and was at all times herein mentioned, a private employment agency as defined by Section 48-501, Compiled Statutes of Nebraska 1929, and has operated and carried on business as a private employment agency in [fol. 4] Omaha, Nebraska, for more than 30 years last past.

II

That Respondent is now, and was at all times herein mentioned, the duly appointed, qualified, and acting Secretary of Labor of the State of Nebraska, charged with the duty of issuing licenses to private employment agencies in the manner prescribed by the Statutes of the State of Nebraska in such cases made and provided.

III

That Relator duly made, executed and filed with Respondent its application for a license, for the year commencing May 1, 1940, to maintain a private employment agency; that Relator duly executed, submitted and filed with Respondent a surety bond in the penal sum of $2,000.00 conditioned as required by law; that your Relator duly tendered to and deposited with Respondent $50.00 in payment of the license

fee in advance for the year commencing the 1st day of May, 1940.

IV

That the filing of the application and the bond aforesaid and the deposit of $50.00 aforesaid with respondent constituted performance by the Relator of all conditions on its part to be performed precedent to the issuance to it of the license aforesaid; that notwithstanding the performance by Relator of all provisions of the law on its part to be performed the Respondent nevertheless has refused and does now refuse to issue to Relator a license to operate and maintain a private employment agency.

V

That it is the plain duty of the Respondent, enjoined upon him by law, to issue said license to the Relator; that said duty requires no exercise of discretion or judgment upon the part of Respondent; that the act required of the Respondent in the issuance of said license is not a judicial act but is a ministerial act only; that by the Respondent's refusal to issue said license to Relator the Respondent has [fol. 5] wilfully failed and refused to perform an act required of him by the Statutes of Nebraska in such cases made and provided, and Respondent has clearly committed an abuse of such discretion as may be in him vested in the premises.

VI

That Respondent has refused and does now refuse to issue to Relator the license aforesaid for the sole reasons that Relator, for many years last past and to the knowledge of Respondent and his predecessors in office, has refused to charge and has refused to agree to charge for its services an amount which, together with the registration fee of $2.00, shall in no case exceed ten per cent (10%) of all moneys paid to or to be earned by the applicant for the first month's service growing out of employment furnished by the Relator, as provided and prescribed by Section 48-508, Compiled Statutes of Nebraska 1929; and in that connection Relator alleges that said Statute, being Section 48-508 of Compiled Statutes of Nebraska 1929, insofar as it limits the fees, compensation and reward of Relator to an

amount which, together with a registration fee of $2.00, shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by Relator, and insofar as said Section fixes or prescribes the maximum compensation, fees, and charges of Relator in conducting a private employment agency is not in fact a law and cannot be enforced, but said pretended Statute is unconstitutional and void, and of no force and effect for the reason that it deprives Relator of his liberty and property without due process of law in contravention and violation of the Constitution of the State of Nebraska wherein it is provided in Article I, Section 3 thereof that no person shall be deprived of life, liberty or property without due process of law, and in contravention and violation of the Constitution of the United States wherein it is provided in the Fourteenth Amendment, Section 1 thereof, that no [fols. 6-11] state shall deprive any person of life, liberty or property without due process of law.

VII

That Relator has no adequate remedy save through the proceedings herein.

VIII

That by reason of the refusal of the Respondent to execute and issue to Relator a license to operate and maintain a private employment agency for the year commencing May 1, 1940, Relator is entitled to a peremptory writ of mandamus compelling the Respondent to issue to Relator the license aforesaid.

Wherefore, Relator prays that a peremptory writ of mandamus issue in this cause ordering the Respondent forthwith to execute and issue to the Relator the license hereinabove described.

Tunison & Joyner, Attorneys for Relator.

Duly sworn to by Harry Knapp. Jurat omitted in printing.

[File endorsement omitted.]

[fols. 12-13] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed May 27, 1940

Comes now Relator, Respondent having heretofore filed his answer herein, and respectfully moves the Court that judgment be entered herein upon the pleadings in favor of Relator and against Respondent.

Tunison & Joyner, Attorneys for Relator.

[File endorsement omitted.]

[fol. 14] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

AMENDED ANSWER—Filed May 28, 1940

Respondent for his amended answer to Petition of Relator:

I

Admits the allegations of paragraphs I, II, and III.

II

Alleges that Respondent has refused to issue a license to Relator for the reason that Relator for a number of years last past has violated the provisions of Section 48-508, Compiled Statutes of Nebraska, 1929, relating to fees by charging fees in excess of ten per cent of the first month's salary or wages, rather than a sum not to exceed ten per cent of the first month's wages or salary, as limited by said statute; and that Respondent advised Relator, through its officers and agents, that it, the Relator, would have to comply with the provisions of said law; and that Relator, through its officers and agents, stated and threatened that it would continue to violate said provisions when and if granted a license for the year commencing May 1, 1940; that Respondent refused and still refuses to grant a license to Relator because of the threat of continued and repeated violations

of said statutory provision, the enforcement of which is a duty enjoined upon the Respondent by Section 48-512, Compiled Statutes of Nebraska, 1929.

III

Alleges that the Respondent's reason for refusing to issue said license to the Relator is a valid justification for [fol. 15] refusing to act in the premises.

IV

Alleges that the business of a private employment agency is vitally affected with a public interest, and that the legislature may in the exercise of the police power, for the promotion of the general welfare of the people of the state, regulate the maximum fees to be exacted from an employee applicant.

V

Denies that any part of Section 48-508, Compiled Statutes of Nebraska, 1929, is in derrogation of any rights, privileges or immunities guaranteed by the constitutions of the State of Nebraska or of the United States.

VI

Denies paragraphs IV, V, VI and VIII, except those portions of said paragraphs heretofore admitted.

Wherefore, Respondent prays that Relator's petition be dismissed and that Respondent go hence without day and that the costs of this action be taxed to the Relator.

V. B. Kinney, Respondent.

Duly sworn to by V. B. Kinney. Jurat omitted in printing.

[fols. 16-17] [File endorsement omitted.]

[fol. 18] IN THE SUPREME COURT OF NEBRASKA

STATE, EX REL, THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator

v.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent

MILLS TEACHERS AGENCY, THOMAS EMPLOYMENT SERVICE, Co-Operative Reference Company, Marti Reference Company, Watts Reference Company, Cornhusker Teachers Bureau, Grace Boomer, Davis School Service, Interveners.

PETITION OF INTERVENTION—Filed May 28, 1940

Come now the above named Interveners and each of them and for cause of action against the Respondent allege:

I

Interveners have an interest in the matter in litigation in the above entitled cause, and in the success of the Relator in said action, and do hereby intervene in the above entitled cause under the authority of and pursuant to Section 20-328, Compiled Statutes of Nebraska, 1929.

II

Each of the above named Interveners is a private employment agency as defined by Section 48-501, Compiled Statutes of Nebraska, 1929, and is now carrying on and maintaining the business of a private employment agency in the State of Nebraska. Interveners confine their business, as does the Relator, to soliciting and securing positions for clerical, executive, technical and professional [fol. 19] workers, and do not engage in the business of securing placements for common laborers, domestic servants or other classes of unskilled workers.

III

Interveners hereby adopt and incorporate herein by reference to Relator's petition the allegations contained in paragraph VI thereof that Section 48-508, Compiled Statutes of Nebraska, 1929, insofar as it limits the compensation

and fees of employment agencies to an amount which together with a registration fee of $2.00, shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by the employment agency, and insofar as said section fixes or prescribes the maximum compensation and fees which Interveners, as private employment agencies, may charge is not in fact a law, but is unconstitutional and void for the reason that it deprives Interveners of their property without due process of law in contravention of the due process clause in Article I, Section 3 of the Nebraska Constitution and Section I of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Interveners pray, as does Relator, that those portions of Section 48-508, Compiled Statutes of Nebraska, 1929, which attempt to limit the fees, compensation and reward of Interveners to an amount which shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by Interveners, be declared void and of no force and effect.

Tunison & Joyner, Attorneys for Interveners.

Duly sworn to by Fay M. Watts. Jurat omitted in printing.

[fols. 20-21] [File endorsement omitted.]

[fol. 22] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION—Filed May 28, 1940

Come now relator and respondent, by their respective attorneys, and hereby agree and stipulate that the sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies.

It is further agreed and stipulated that the amended answer of the respondent heretofore filed shall stand and con-

stitute an answer to the petition of intervention filed on the 28th day of May, 1940.

Tunison & Joyner, Attorneys for Relator and Interveners. Walter R. Johnson, Attorney General. By Don Kelley, Assistant Attorney General, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF NEBRASKA

MINUTE ENTRY—Filed June 6, 1940

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

No. 3102. State ex rel. Western Reference & Bond Assn. v. Kinney, Original.

* * * * * * *

Robert G. Simmons, Chief Justice.

[fols. 24-25] IN SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, EX REL, THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator,

v.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent,

MILLS TEACHERS AGENCY, et al., Interveners

JUDGMENT—Filed August 2, 1940

This cause coming on to be heard upon the petition, the answer, the petition in intervention, the amended answer, the motion of relator for judgment on the pleadings, and a stipulation of counsel, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds the issues in favor of the relator and the interveners.

It is, therefore, considered, ordered and adjudged that a peremptory writ of mandamus issue against the respondent commanding him to issue to relator and to the intervenors licenses to operate private employment agencies as defined by Section 48-501, Compiled Statutes of Nebraska for 1929, and that he pay the costs herein incurred, taxed at $; for all of which execution is hereby awarded.

Opinion by Messmore, Judge. Johnsen, Judge dissents.

W. B. Rose, Acting Chief Justice.

[fol. 26] IN SUPREME COURT OF NEBRASKA

[Title omitted]

OPINION—Filed August 2, 1940

1. A motion for judgment on the pleadings admits only facts well pleaded in an answer and does not admit a conclusion of law.

2. Section 9, art. XV of the Nebraska Constitution, provides: The legislature may enact laws "for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare." In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that the factual situation favors the legislature in enacting such law, and that it is not in contravention of section 3, art. I of the Constitution of Nebraska, the due process clause.

3. That part of section 48-508, Comp. St. 1929, objected to, wherein the maximum amount that may be charged by a private employment agency for services rendered is fixed, is unconstitutional in that it contravenes section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The power to require a license for and to regulate the conduct of private employment agencies is distinct from the power to fix prices. Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545.

[fol. 27] Heard before Simmons, C. J., Rose, Eberly, Paine, Carter, Messmore and Johnsen, JJ.

MESSMORE, J.:

This is an original action in mandamus. The relator is a private employment agency and seeks to compel the secretary of labor of Nebraska to issue it a license to do business as such. The respondent refused to issue a license because relator refused to comply with section 48-508, Comp. St. 1929, fixing the maximum compensation which an employment agency may collect. The respondent's answer seeks to justify the refusal to issue the license for the reason as above stated, and specifically alleges that the business of a private employment agency is vitally affected with a public interest, and the legislature, in the exercise of its police power, can lawfully regulate the maximum fee. A petition in intervention was filed by eight additional agencies, which allege that they operate on the same basis as the relator. By stipulation, the respondent's answer stands to the petitions in intervention. The relator filed a motion for judgement on the pleadings.

By stipulation, the only issue for determination in the cause is the constitutionality of section 48-508, Comp. St. 1929, in so far as the same fixes or limits the fees or compensation for private employment agencies.

The respondent contends that the motion of relator for judgment on the pleadings has the effect of admitting all material facts in the answer.

A motion for judgment on the pleadings admits, either directly or impliedly, the truth of all well pleaded facts in the pleading of the opposing party. Such a motion is in the nature of a demurrer and raises an issue of law only. Van Etten v. Kosters, 48 Neb. 152, 66 N. W. 1106; Webster v. City of Hastings, 56 Neb. 669, 77 N. W. 127; Abraham v. Studebaker Corporation, 113 Neb. 721, 204 N. W. 786. A motion for judgment on the pleadings does not admit con- [fol. 28] clusions of the pleader. The allegation in respondent's answer,—that the business of a private employment agency in Nebraska is vitally affected with a public interest,—is a conclusion of law. State v. Wurdeman, 311 Mo. 64, 277 S. W. 571; Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U. S. 54, 58 S. Ct. 466.

The pertinent part of the statute here involved is as follows: "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or

exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent. of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.'" Comp. St. 1929, sec. 48-508.

Relator concedes that a private employment agency is subject to regulation by the state and may be compelled to pay a license fee for the privilege of conducting such business. Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545. Relator's claim is that the part of the statute above set out, fixing the fees and compensation of an employment agency, is in contravention of section 3, art. I of the Constitution of Nebraska, which reads: "No person shall be deprived of life, liberty, or property, without due process of law."

The respondent cites section 9, art. XV of the Constitution of Nebraska, as follows: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and *for the prevention of unfair business practices and unconscionable* [fol. 29] *gains in any business or vocation affecting the public welfare.* An industrial commission may be created for the purpose of administering such laws, and appeals shall lie to the supreme court from the final orders and judgments of such commission." (Italics ours.)

The respondent's contention is that the language in italics disposes of the relator's challenge, so far as the Nebraska Constitution is concerned; that such provision of the Constitution gives to the legislature authority to enact laws to prevent unfair business practices and unconscionable gains affecting the public welfare.

The language of section 9, art. XV, as above quoted, is clear and comprehensive. In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that on the factual situation the legislature, in enacting section 48-508, Comp. St. 1929, contemplated that such act was in accord with section 9, art. XV of the

Constitution. Under the circumstances, we conclude: That part of section 48-508, Comp. St. 1929, objected to, does not contravene section 3 art. I of the Constitution.

Relator further contends that the issue, as stated, contravenes that part of section 1 of the Fourteenth Amendment to the Constitution of the United States, reading in part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Our attention is specifically called to the case of Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, decided May 28, 1928. The New Jersey statute empowered the commissioner of labor to provide a schedule of fees for services to employers seeking employees and persons seeking employment. Discretion with reference to the fees and granting of the license was left to the labor commissioner. All conditions of the statute were conformed to and complied with [fol. 30] except the part with reference to the fees as fixed in the schedule and charged therein. The Ribnik case is analagous to the instant case, except that the statute in Nebraska fixes the maximum charge. The court in Ribnik v. McBride, Supra, held: "The business of an employment agent is not one 'affected with a public interest,'" so as to enable the state to fix charges to be made for the service rendered.

"The power to require a license for, and to regulate the conduct of, a business, is distinct from the power to fix prices." In the opinion it was said (p. 355): "But the question here presented is whether the due process of law clause (of the federal Constitution) is contravened by the legislation attempting to confer upon the Commissioner of Labor power to fix the prices which the employment agent shall charge for his services." And at page 356, quoting from the opinion in Wolff Co. v. Industrial Court, 262 U. S. 522, 537, 43 S. Ct. 630, 27 A. L. R. 1280, it was said: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation * * * one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

The respondent has cited and analyzed many subsequent decisions to Ribnik v. McBride, supra, in an attempt to disclose that the supreme court of the United States has deviated from such decision, to show a general trend therefrom, emphasizing, among other cases, West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 108 A. L. R. 1330, wherein the case of Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, was overruled. The language of the court in Adkins v. Children's Hospital, relied on in Ribnik v. Mc-[fol. 31] Bride, supra, appearing on page 356, of that opinion, is as follows:

"In Adkins v. Children's Hospital, 261 U. S. 525, this court had under consideration an act of congress fixing minimum wages for women and children in the District of Columbia. The legislation, so far as it affected women, was held invalid as contravening the due process of law clause of the Fifth Amendment, because it was an arbitrary interference with the right to contract in respect of terms of private employment. It was said (p. 546) that while there was no such thing as absolute freedom of contract, nevertheless, freedom of contract was the general rule and restraint the exception; and that 'the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.'"

The case of West Coast Hotel Co. v. Parrish, supra, upheld the statute of the state of Washington in fixing minimum wages for women and minors, and expressly overruled Adkins v. Children's Hospital, supra. Therefore, it is the respondent's contention, a deathblow was delivered to the Ribnik case. In any event, that case was not expressly overruled in West Coast Hotel Co. v. Parrish, supra.

The respondent also cites Tagg Bros. v. United States, 280 U. S. 420, 50 S. Ct. 220. That case involved the enforcement of regulations prescribed by the secretary of agriculture in fixing the fees which commissionmen could charge the seller for handling stock. We believe this situation to be entirely different. The court pointed out the distinction between Tagg Bros. v. United States and the Ribnik case, stating, in substance, that in the latter the court did not hold that the charge for personal services cannot be regulated. The question decided by the court was whether the services then attempted to be regulated were vested with a

public interest to such extent as to require regulation of the fees an employment agency could charge for services rendered. The Ribnik case held that such business was not affected with a public interest to the extent of requiring the fixing of charges. Tagg Bros. v. United States, supra, does not overrule Ribnik v. McBride.

[fol. 32] The respondent also contends that certain language by Mr. Justice Brandeis in Tagg Bros. v. United States, in fact, nullifies Tyson & Brother v. Banton, 273 U. S. 418, 47 S. Ct. 426, 58 A. L. R. 1236, in so far as such decision is relied upon and cited in Ribnik v. McBride; this on the theory that Mr. Justice Sanford, in concurring in the Ribnik case, did so on the sole authority of Tyson & Brother v. Banton, in that he was unable to distinguish between a labor broker and a theater broker. Respondent implies that the court states: Fixing charges for personal services of brokers is no longer good reason for declaring price-fixing regulations unconstitutional, and respondent reasons that Tagg Bros. v. United States, supra, overruled Ribnik v. McBride by implication.

The holding in Tyson & Brother v. Banton, supra, is set forth in substance in Ribnik v. McBride, as follows (p. 358): "And we since held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.' Tyson & Brother v. Banton, supra, p. 431." The opinion in Ribnik v. McBride also states (p. 355): "And again (p. 438) after reviewing former decisions, it was said that 'each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.'"

The foregoing language is clear on the issue of price-fixing. Tyson & Brother v. Banton, supra, has not been [fol. 33] overruled by the supreme court of the United States

and still constitutes a cardinal part of the law relied upon in the Ribnik case.

The respondent relies to a great extent on Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, which involved the constitutionality of a New York statute, creating a control board to fix minimum and maximum retail prices to be charged by stores to consumers off the premises where sold. The question presented was whether the federal Constitution prohibited the fixing of the price of milk (held to be food by federal decisions and by the Nebraska supreme court). The court upheld the statute.

The respondent asserts that Ribnik v. McBride, supra, premised the decision on the following: That the fixing of prices for food and clothing, for house rentals or wages to be paid, whether minimum or maximum, is beyond the legislative power. Referring again to Nebbia v. New York, supra, the respondent contends that that case approved the fixing of prices for food, thus dispensing with such reasoning in the Ribnik case. In the Nebbia case the court held: "There is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (In the instant case there is no contention on the part of the relator that that part of section 48-508, Comp. St. 1929, here objected to, is arbitrary or discriminatory.) In support of its contention in distinguishing the Nebbia case, the relator calls attention to the foregoing language.

To clarify relator's distinction between Ribnik v. McBride and Nebbia v. New York, in the former case, the attempted regulation of the price to be charged by private employment agencies was squarely before the court and held not to be subject to state regulation in such respect. Attention [fol. 34] is further called by respondent to the far-reaching effect of the case of Nebbia v. New York, in that the court gave a new meaning to the phrase, "affected with a public interest," and concluded such formula was without value in determining the power of the state to regulate a business, thus definitely removing the taboo against price-fixing. Establishing the principle of the character of the business does not prevent the state from regulating prices. The

limitation of the test set up by the court is that the legislation must not be arbitrary, discriminatory or demonstrably irrelevant to the policy that the legislature is free to adopt. In the instant case it is true that the relator made no claim that the legislation here objected to on the point at issue was arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt. While the force of this decision is apparent on the issue therein involved, it obviously draws a distinction between a case involving the milk industry and that of a private employment agency. Otherwise, we firmly believe, the supreme court would have overruled Ribnik v. McBride, supra.

Respondent cites the case of Abbye Employment Agency v. Robinson, 166 Misc. 820, 2 N. Y. Supp. (2d) 947, with reference to a legislative act which fixed the gross fees chargeable to applicants for employment in certain enumerated occupations and common labor of the necessitous class, which, in effect, repudiated the holding in Ribnik v. McBride, and possibly cited for the purpose of disclosing the thought of a New York court on the subject. Nevertheless, the decision is not one by a court of last resort of the state of New York, and not the final word on the subject, so far as that state is concerned, and would, therefore, be of no material value in its effect on Ribnik v. McBride, which has not been overruled by the court that rendered the decision.

The respondent cites Sunshine Anthracite Coal Co. v. Adkins, — U. S. —, 60 S. Ct. 907, decided May 20, 1940, in which the Supreme Court of the United States had before it an act providing for the sale and distribution of bituminous coal. [fol. 35] The aim of the act was to stabilize the industry primarily through price-fixing and the elimination of unfair competition. The court upheld the act. The effect was to regulate the business of such coal industry in so far as it affected the mining operator, and fixed and regulated the price of the product and the miner's wages. The regulatory provisions were held to be within the power of congress under the commerce clause of the Constitution. The powers of congress under the commerce clause are restricted by the Fifth Amendment in the same manner as the powers of state legislatures are restricted by the Fourteenth Amendment, so what the court has to say as to the one is generally applicable to both.

Respondent cites the foregoing case and specifically calls our attention to the language cited in the Ribnik case from Wolff Co. v. Industrial Court, supra, as follows: "It has never been supposed, since the adoption of the Constitution, that the business of * * * the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." Sunshine Anthracite Coal Co. v. Adkins refers directly to mining operators and miners. The distinction between the federal act in the reported cases and the statute under consideration in the instant case is a palpable one and clearly manifested by the provisions of the bituminous coal act, appearing in the opinion, which, if set out, would unnecessarily lengthen this opinion.

We are cognizant of the distinction contended for by respondent in the cases cited and analyzed. The mere fact that certain cases, upon which a decision has been predicated, are either subsequently overruled or the reasoning therein changed or given a new meaning, does not, in fact, overrule such decision. In order to ascertain the full effect and reasoning of a decision, all the language appearing in the opinion to sustain it must be taken into consideration and given equal credence. Cases may be similar and yet not alike. The industries affected by subsequent decisions of [fol. 36] the Supreme Court to Ribnik v. McBride are industries distinctively different from the one affected by the Ribnik decision. Suffice it to say that no decision from a court of last resort, expressing a view contra to that determined in Ribnik v. McBride, has been cited by the respondent.

There is no doubt that the Supreme Court of the United States has, on account of economic conditions that have supervened, recognized that further exercise of the protective power of the state was required and acted accordingly, taking judicial notice of the existence of unemployment and demand for relief, occasioned by an economic depression. That the country has been faced with a distressing economic depression, in which millions of our fellow citizens have been out of employment and unable to secure it, and in many instances only by the grace of the United States government, is too well known to admit of argument or discussion. While for many years employment agencies have been created by many states, civic and labor organizations, to which those unemployed might resort without charge to

them, this field has been vitally enlarged upon by both the federal government and the states, and such other organizations as previously mentioned, to such extent that it is apparent that the business of an employment agency is distinctively one of a highly competitive nature. An attempt to establish a uniform fee for a valuable service and less valuable service, without the expense of overhead, would seem to be hopelessly impracticable, within the limits of constitutional rights.

The relator is engaged in a beneficial business. Constituting part of its property are services rendered in obtaining employment. One is not obligated, nor is it compulsory, to employ relator, and the person seeking to avail himself of such services is at liberty to reject them, if the terms of the contract for compensation are not satisfactory. This right of contract, common to all followers of legitimate vocations, constitutes an asset of the relator and is a part of the property, in the enjoyment of which [fol. 37] relator is guaranteed protection by the Constitution. By that part of section 48-508, Comp. St. 1929, objected to, relator is stripped of the right of contract, deprived of property, circumscribed and hampered in the vocation followed and in the pursuit of livelihood by a provision in an act not applicable in many other occupations.

Speaking of the regulation of the business of relator with reference to fixing prices for services rendered, the relator meets severe competition, and surely such competition is effective in the regulation of fees charged. If the fee be exorbitant or unreasonable, an adequate remedy is provided by law as against the relator and, under the terms of the act, might be very properly exercised.

In view of all argument, the pertinent legal conception is that the Supreme Court of the United States has not expressly overruled the case of Ribnik v. McBride, supra, and our research confirms this fact. The respondent desires that we march on past the decision in the Ribnik case and do the thing that the United States Supreme Court has not seen fit to do. We cannot logically indulge in speculation, however much we may be impressed with masterly dissenting opinions. We conclude that we are bound by the decisions of the Supreme Court of the United States in its interpretation of the federal Constitution.

We make reference to First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762, in which this court held: " 'The United States Supreme Court and the Supreme Court of this state are peers. The decisions of the former upon the federal Constitution and laws are binding on the latter; the decisions of the latter upon the Constitution and laws of Nebraska are binding on the former.' Franklin v. Kelley, 2 Neb. 79."

Giving effect to Ribnik v. McBride, supra, that part of section 48-508, Comp. St. 1929, constituting the issue is un- [fol. 38] constitutional in that it contravenes the due process clause of the Constitution of the United States.

The relator's motion for judgment on the pleadings in such respect is sustained.

It is hereby ordered and adjudged that a peremptory writ should issue, commanding the respondent to issue to the relator a license to operate an employment agency for the year commencing May 1, 1940. Judgment accordingly.

DISSENTING OPINION

JOHNSEN, J., dissenting:

I am unable to agree with the majority that Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, is decisive of the present case.

First of all, the statement of Mr. Justice Brandeis, in the unanimous opinion in Tagg Bros. v. United States, 280 U. S. 420, 439, 50 S. Ct. 220, 74 L. Ed. 524, should be noted: "This court did not hold in * * * Ribnik v. McBride that charges for personal services cannot be regulated. The question upon which this court divided * * * was whether the services there sought to be regulated were *then* affected with a public interest." (Italics mine.)

The question to be determined here is not whether in 1928, when the Ribnik case was decided, the employment agency business was sufficiently affected with a public interest to permit the legislature to limit its charges for services, but whether it is so affected at the present time. "It is clear," says Mr. Justice Roberts, speaking for the majority in Nebbia v. New York, 291 U. S. 502, 536, 54 S. Ct. 505, 78 L. Ed. 940, "That there is no closed class or cate-

gory of businesses affected with a public interest * * *." Or, as Mr. Justice Holmes expressed it in the majority opinion in Block v. Hirsh, 256 U. S. 135, 65 L. Ed. 865, 41 S. Ct. 458, "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of [fol. 39] purely private concern." Mr. Chief Justice Taft gave recognition to the same view, in Wolff Co. v. Industrial Court, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, when he classified, as clothed or affected with a public interest, "Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

With me, the conviction is clear that, if the employment agency business did not hold such a peculiar relation to the public as to permit the legislature to limit its charges for services in the prosperous era of a decade and a half ago, the staggering unemployment problem of the past few years has now placed it in that category. This economic condition is, of course, a proper matter for judicial notice. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703. Today, if not in 1928, the declarations of Mr. Justice Stone, in his dissenting opinion in the Ribnik case, are peculiarly applicable and controlling: "We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects, Brazee v. Michigan, 241 U. S. 340, and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. * * * There is a public interest at such times in bringing about a prompt readjustment of the labor supply to industry's need for labor. The additional barrier to a quick readjustment created by the agencies' raising of their rates affects that interest adversely.

The establishment of a reasonable maximum rate is well [fol. 40] calculated to obviate the abuse."

To what extent, in the field of price regulation, the Supreme Court of the United States has in fact broadened the principle of the Ribnik case, in the subsequent decisions of Tagg Bros. v. United States, supra. (Commissionmen's fees), Nebbia v. New York, supra, (milk prices), West Coast Hotel Co. v. Parrish, supra, (female minimum wage), and Sunshine Anthracite Coal Co. v. Adkins, — U. S. —, 60 S. Ct. 907, 84 L. Ed. 825, (bituminous coal prices), I deem it unnecessary to discuss. These decisions at least have not moved in the direction toward which the Ribnik case pointed. For present purposes, it is sufficient to say that the vast economic changes that have occurred since the Ribnik case was decided, and the close relationship that employment agencies now bear to the unemployment problem present such differences in conditions that that decision can no longer be regarded as controlling, and we are entitled to make a new examination of the question. In the necessitous and unequal bargaining position in which the unemployed have come to be placed, it is not unconstitutional to close the doors to any possibility of overreaching or "job selling."

The majority opinion is content to rest upon the ground that the Ribnik case has never been expressly overruled. This seems to me too narrow a view of real judicial responsibility. It is not les majesty to question the continued existence of the circumstances and conditions upon which a decision of the Supreme Court of the United States has been predicated, and in such a situation to reexamine the problem that is involved. In some instances this may be the only way in which that court will ever be afforded the opportunity to review its former decision. It was such a reexamination by the Supreme Court of Washington of Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, and a refusal to recognize it is as controlling, that resulted in a review and overruling of it in the subsequent case of West Coast Hotel Co. v. Parrish, supra. Judicial decisions must not become mere copybooks, but they should [fol. 41] always be present admeasurements of the principles and the spirit of the law. Except as to definite and invariable prescriptions and prohibitions of the Constitution, and such limited rules of property as, in the interest of society as a whole, require a permanent crystallization, past

decisions do not establish the finalities of the law, and no sound judicial body will ever deal with them as such. Such decisions necessarily should be employed to measure and test the soundness of judicial thinking, and to safeguard it against transient instability, or the whims of changing personnel, but they obviously can never mark the boundaries to which the thought of the law can extend or its spirit can move.

The majority have properly refused to be guided by the reasoning in the Ribnik case in testing the validity of the statute involved under our state Constitution. They have properly held under that instrument that the employment agency business is one "affecting the public welfare." They have inconsistently refused, however, to recognize it as one "affected with a public interest" under the federal Constitution, because they are unwilling to allow their thoughts in that field to move beyond the boundaries of the Ribnik case. I am unable to stop there. The statute in my opinion is violative of neither the state nor the federal Constitution, and the application for a writ of mandamus ought accordingly to be denied.

The reasonableness of the charge fixed by the legislature in the statute is not raised in this proceeding and so is not involved.

[fols. 42-43] Petition for rehearing covering 10 pages filed September 5, 1940, omitted from this print. It was denied, and nothing more by order October 8, 1940.

[fols. 44-45] In Supreme Court of Nebraska

[Title omitted]

Order Denying Motion for Rehearing—October 8, 1940

This cause coming on to be heard upon motion of respondent for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons, Chief Justice.

[fol. 46] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

PRAECIPE—Filed November 25, 1940

To the Clerk of the Supreme Court:

Please prepare a certified transcript of the record in the above captioned case, with index, including in said record the following: 1: The Petition; 2: The Answer; 3: The Petition of Intervention; 4: The Amended Answer; 5: The Motion for Judgment on the Pleadings; 6: The Stipulation; 7: The Judgment of the Court; 8: The Opinion, including the dissenting opinion of Justice Johnsen; 9: The Motion for Re-hearing; 10: The Order Overruling the Motion for Rehearing; 11: A copy of this Praecipe.

Dated this 25th day of November, 1940.

Walter R. Johnson, Attorney General. By Don Kelley, Assistant Attorney General, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated between the parties that the original answer filed by the petitioner in the Court below be eliminated from the printed record to be filed in this Court.

It is further stipulated between the parties that the petition for rehearing in the Court below be eliminated from the printed record which is to be filed in this Court.

[fol. 49] Walter R. Johnson, Attorney General of the State of Nebraska, for Petitioner. Tunison & Joyner, Attorneys for Respondents.

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[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.